UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
The Leadership Council for
Metropolitan Open Communities,

Charging Party,

and

The Leadership Council for Metropolitan
Open Communities and Marsha Allen,

Intervenors

v.

Stanley Jancik,

Respondent.

HUDALJ 05-91-0969-1
Dated: October 1, 1993

Henry T. Synek, Esq.
For the Respondent

Eileen Ray, Esq.
For the Secretary

Edward Voci, Esq.
For the Intervenors

Before: WILLIAM C. CREGAR
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint of discrimination based upon familial status and race in violation of the Fair Housing Act as amended, 42 U.S.C. §§. 3601, *et seq.* ("Fair Housing Act" or "Act") and 24 C.F.R. Parts 103 and 104. A complaint and amended complaints were filed with the Department of Housing and Urban Development ("the Charging Party" or "HUD") by the Leadership Council for Metropolitan Open Communities ("the Council") on May 22, 1991, September 12, 1991, and January 8, 1992, respectively. On June 16, 1992, HUD's Regional Counsel issued a Determination of No Reasonable Cause. On October 16, 1992, HUD's General Counsel, having reconsidered the Determination of No Reasonable Cause, issued a Determination of Reasonable Cause and Charge of Discrimination on behalf of the Council. On March 18, 1993, I granted the joint motion of the Council and Marsha Allen to intervene in this proceeding. A hearing was held in Chicago, Illinois on June 2-3, 1993.[1] Post-hearing briefs were timely filed by the parties on or before August 2, 1993.[2]

Respondent is charged with 1) unlawfully discriminating against families with children by placing an advertisement in a local paper expressing a preference, limitation, or discrimination against families with children and 2) unlawfully making statements expressing a preference, limitation, or discrimination based on both race and familial status and unlawfully inquiring into the race and familial status of two "testers" acting on behalf of the Council. *See* 42 U.S.C. § 3604 (c); 24 C.F.R. §§ 100.50 (b)(4); 100.75 (a) and (c)(1) and (2); 109.20 (b)(7). One of these "testers" is Intervenor Marsha

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[1]The hearing was originally scheduled to commence on January 7, 1993. To afford Respondent additional time to file his Answer, I granted a Motion to reset the hearing to February 4, 1993. I granted additional continuances to April 15, 1993, and June 2, 1993, in order to accommodate Respondent's health problems.

[2]The date originally set for the filing of Post-hearing briefs was July 26, 1993. At a July 26, 1993, post-hearing telephone conference call, I granted Respondent's unopposed request to extend this date to August 2, 1993.

Allen. The Charging Party and the Council seek damages for economic loss and "frustration of purpose." Ms. Allen seeks damages for humiliation and emotional harm. The Charging Party and both Intervenors seek the imposition of a $10,000 civil penalty and appropriate injunctive and equitable relief.

Respondent denies any wrongdoing. He asserts that he did not intend to discriminate and, in fact, did not do so, that his advertisements did not violate the Act, and that his rental practices reflect multi-cultural policies and practices.

Statement of Facts

The Parties and the Testers

1. The Council is a private non-profit organization formed in 1966 under the laws of the State of Illinois and based in Chicago. Its purpose is to promote equal opportunity in housing in the Chicago metropolitan area by eliminating discriminatory housing practices. C.P. Ex. 3; Int. Exs. 9, 11; Tr. 2-94.[3] Its programs include counseling, public outreach, education services, and investigating housing discrimination allegations. Tr. 2-102, 106, 108-09. The Council has thirty-six full-time and three part-time employees. Since September 1992, Aurie Pennick has been the Council's President and Chief Executive Officer. She is responsible for the administration and oversight of the Council. Her duties include fundraising, marketing, public relations, budgeting, and supervision of the staff. Tr. 2-92, 93.

2. Specifically, the Council operates six programs and is beginning a seventh. The existing programs are: 1) the Gautreaux Assisted Housing Program[4] which assists families

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[3]The following reference abbreviations are used in this decision: "C.P. Ex." for Charging Party's Exhibit, "Int. Ex." for Intervenors' Exhibit, "Res. Ex." for Respondent's Exhibit, "Stip." for Stipulation of Fact entered into by the parties and contained in Joint Exhibit 1, and "Tr. 1-" and "Tr. 2-" for Transcript Volumes 1 and 2 with the page number inserted after the hyphen.

[4]*See Hills v. Gautreaux*, 425 U.S. 284 (1976).

receiving "Section 8" housing subsidies to find non-segregated housing; 2) the Supportive Services Program which follows up with Gautreaux families by helping them adjust to their new neighborhoods; 3) the Counselling Program which assists minority renters and prospective first-time homeowners to locate housing in communities other than those to which minorities have traditionally gravitated; 4) the Housing Initiative Program which assists local realtors to identify and eliminate discriminatory housing practices; 5) the Community Relations and Outreach Program which aids municipalities desirous of developing and maintaining integrated communities; and 6) the Legal Action Program ("LAP") which enforces fair housing laws through investigation, testing, and litigation. Int. Ex. 12 at numbered pp. 4-5; Tr. 2-102-107. The seventh program is the Fair Lending Initiative Program which will assist banks striving to eliminate discrimination in lending. Tr. 2-108-110. The Council prefers to devote its resources to cooperative programs with housing providers and lenders and to de-emphasize its historical adversarial approach. Tr. 2-147.

3. The LAP conducts tests of various housing providers to determine the effectiveness of the Council's training, education, and outreach programs, and to support the enforcement of fair housing laws. The tests are of two types: 1) complaint based tests resulting from individual complaints of discrimination filed with the Council and 2) systemic tests initiated by the Council on its own. Tr. 2-35, 114.

4. The LAP has five full-time staff persons and a part-time director. Tr. 2-107. Edward Voci is the Director of the LAP as well as the Council's General Counsel. In addition to directing LAP activities, his responsibilities include reviewing contracts between the Council and housing providers and representing the Council in personnel and corporate matters. Tr. 2-128, 134.

5. Glenn Brewer has been the Council's LAP Investigations Manager for the past five years. His annual salary is $32,000. Tr. 2-137. He is responsible for all investigations conducted in response to complaints of discrimination and for the systemic testing program. He develops and supervises systemic tests and trains volunteer "testers." Tr. 2-34-35, 38, 64-66.

6. Intervenor Marsha Allen works as an evidence technician at the United States Drug Enforcement Agency. Ms. Allen is Black. She has been a volunteer tester for the Council for approximately three and one-half years. She is an experienced tester having conducted at least 75 tests. Tr. 1-135-137; Tr. 2-46.

7. Cindy Gunderson is employed as a social worker for Catholic Charities. Ms. Gunderson is White. She has been a volunteer tester for the Council for approximately ten years, during which time she has conducted at least 100 tests. Tr. 1-114-116; Tr. 2-46.

8. Respondent Stanley Jancik, a resident of Berwyn, Illinois, is a 79 year-old White immigrant from Czechoslovakia.[5] He is the sole owner of King Arthur's Court Building No. 44 in Northlake, Illinois, a Western suburb of Chicago. Tr. 1-65; Tr. 2-158; Stip. Nos. 1, 3. He has owned this building since 1966. Tr. 1-46. King Arthur's Court consists of 44 buildings surrounding a campus-like court yard with a single entrance and exit. Building No. 44 is a multi-family building consisting of 14 separate one-bedroom apartments. It is well maintained and reasonably priced for the market. Nearby schools include West Leyden Township High School and Roy (elementary) School. Although children live in other buildings in King Arthur's Court, since 1966 no families with children have ever lived in Building No. 44. Tr. 1-61; Tr. 2-12-14, 175-76; Stip. Nos. 3-4, 13. Respondent also owns a multi-family rental property in Cicero, Illinois, and has a net worth in excess of $400,000 and an annual income of approximately $30,000. Tr. 2-159; C.P. Ex. 8.

The Advertisement and the Tests

9. On or about August 29, 1990, Mr. Jancik placed an advertisement in the *Oak Leaves*, a Chicago suburban newspaper, which stated:

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[5]Mr. Jancik told Ms. Gunderson that he was an "old times (sic) Bohemian." Int. Ex. 5 at 6.

> NORTHLAKE deluxe 1BR apt, a/c, newer quiet bldg, pool, prkg, mature person preferred, credit checked. $395 (708) 484-1118.

C.P. Ex. 7; Stip. Nos. 5, 6.[6]

10. Glenn Brewer read the advertisement. Noting the phrase, "mature person preferred," and suspecting that it might indicate violations of the Act, he selected Respondent's property as the subject for a systemic test which he then spent approximately one hour designing. Tr. 2-48, 51, 56. The process of designing a test involves constructing fictitious identities for the testers and selecting the appropriate testers to perform the test - in this case, Cindy Gunderson and Marsha Allen. Both were given the identities created by Mr. Brewer, and both were told to call the number listed in the advertisement and inquire about the vacant apartment. Tr. 1-119, 138, 152-53; Tr. 2-56.

11. At 7:27 p.m. on September 7, 1990, Cindy Gunderson called the listed phone number and spoke to an unidentified woman. The woman asked Ms. Gunderson who would be occupying the apartment. Ms. Gunderson told the woman that the apartment was for herself. The woman told Ms. Gunderson that she needed to talk to her husband who was not home at the time. Ms. Gunderson left her phone number with the woman. Int. Ex. 5 at 6; Tr. 1-121. A few minutes after Ms. Gunderson placed her call, Marsha Allen made hers. Ms. Allen was also told by an unidentified woman that it was necessary to speak with the woman's husband. Ms. Allen did not leave her number with the woman. Tr. 1-140-141; Int. Ex. 4 at 6.

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[6]Although the Determination of Reasonable Cause and Charge of Discrimination alleges that Respondent placed only one advertisement, the stipulations state that "[d]uring August and September 1990, respondent . . . personally drafted and placed a *series* of newspaper advertisements. . . ." Stip. No. 5 (emphasis added). In fact, C.P. Ex. 7 contains five such ads with language of "mature person preferred," "older person preferred," and "adult pref." Because only one advertisement is alleged to have violated the Act, I have not considered these other advertisements as additional violations of the Act. However, I have considered them for the purpose of determining an appropriate civil penalty.

12. At 7:58 p.m. on September 7, 1990, Mr. Jancik returned Ms. Gunderson's call. After asking Ms. Gunderson who the tenant would be and describing the apartment to her, he asked her age. She told him she was 36. He then said "that was good, that he [didn't] want any teenagers in there." He went on to describe the rent, the amount of security deposit required, and other information about the apartment. He inquired about her employment and present residence. At some point in the conversation after stating his own name, Respondent asked for Ms. Gunderson's name which she then gave him. He asked her what kind of name it was. She told him it was Norwegian. Mr. Jancik asked if the name was "White Norwegian or Black Norwegian." She repeated that it was a Norwegian name. Respondent repeated the question. She inquired if he was asking to know her race. He agreed that he was.[7] She told him she was White. Ms. Gunderson again asked to see the apartment. He then told her to call his manager, Ruth Allen, and inform Mrs. Allen that she had spoken with him. He told her that Mrs. Allen would show her the apartment. He gave Ms. Gunderson directions. Ms. Gunderson set up an appointment with Ruth Allen for 10:00 a.m. the following morning. Int. Ex. 5 at 6-7; Tr. 1-121-124.

13. At 10:00 p.m. on September 7, 1990, Marsha Allen again called the number listed in the advertisement. This time she spoke to Mr. Jancik.[8] He asked questions concerning Ms. Allen's

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[7]In an affidavit, dated June 11, 1991, Respondent originally denied asking the callers to identify their race. He now admits asking these questions. His affidavit states that, "at no time did he ever ask a caller whether he or she is of any race, black, or white, or yellow, or red, or brown, and further, never did he ask a caller as to the caller's ethnic or religious background." Int. Ex. 6, at Para. 11. His Answer sets forth a more ambiguous denial. In it he denies asking callers if they were white, black, yellow, or brown. Answer, Paras. 13, 14. In his deposition, he denied having asked Ms. Gunderson whether she was a Black or White Norwegian. While testifying he stated that it was "possible" that he made such an inquiry. Tr. 1-77. His Post-hearing Brief acknowledges that Mr. Jancik asked these questions. Respondent's Post-hearing Brief at 11-12.

[8]Although Mr. Jancik never identified himself, I find that Ms. Allen did indeed speak to him. He supplied information about the apartment building, and she identified the speaker as having a foreign accent who spoke in broken

occupation, income, age, marital status, and whether she had any children or pets. During the conversation, Respondent stated that he did not want children in the building because they make too much noise and would disturb the older tenants. Towards the end of the conversation Respondent asked Ms. Allen to identify her race. Rather than answer this particular inquiry, she asked him why he was asking all of the questions. Mr. Jancik replied that he needed to screen applicants. Because the tenants were middle aged, he did not want anyone "who was loud, made a lot of noise and had children or pets." Int. Ex. 4 at 6. She told him she didn't have children or pets, and he said, "wonderful." *Id.* at 7. He gave her Ruth Allen's phone number. Marsha Allen called Ruth Allen and set up an appointment for between 10:00 and 10:30 a.m. the following morning. Int. Ex. 4 at 6-7; Tr. 1-141-142, 146, 160.

14. The next morning at approximately 10:00 a.m. both testers arrived for their appointments at Building 44. In separate conversations, Ruth Allen told both that the apartment had been rented that morning. Each completed a tester report. Int. Exs. 4 at 7, 5 at 7-8; Tr. 1-125, 146. Based upon these reports, the Council filed its housing discrimination complaint against Respondent with HUD on May 22, 1991. C.P. 1.

Other Evidence of Discrimination

15. Respondent has never rented to families with children. C.P. 8 at 5.[9] He admitted in an affidavit dated June 11, 1991,

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English. Tr. 1-157. Mr. Jancik's speech patterns are as she described them.

[9]Respondent's conflicting statements on this point further illustrate his lack of credibility. In his response to HUD's First Request for Admissions, Respondent states that he never rented to families with children "since no

that he screens prospective applicants for teenagers and children. He then refers those applicants without children to his rental manager. Int. Ex. 6. Mr. Jancik stated to Mr. Ziegeldorf, the HUD Equal Opportunity Specialist who investigated the complaint against Respondent, that he would not rent to a 35 year old adult with a ten year old child. Tr. 2-8.[10]

16. Respondent asked Dorothy Roberts, a present tenant, to identify her nationality when she inquired about an apartment. Ms. Roberts responded that she was Black. Tr. 1-101. He testified that, "I ask them because I come from the country - - nationalities, and I ask them are you Bohemian, or Slovak, or Black Bohemian[11] or Gypsy or whatever you are, I don't care." Tr. 1-64. During his deposition, he made the following statements: "I like the Mexicans because they don't like not to pay rent;" and "[Y]ou got so many Gypsies and you got these sons of guns, these people coming from Ukraine, you know, they are cheaters, so you have to ask [their nationality]." Tr. 1-71, 73. He classified his own resident manager, Ruth Allen, as a

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family with children ever applied." C.P. 8 at 5. Respondent directly contradicts this admission by describing instances wherein he would attempt to discourage prospective applicants with children from applying. He testified that he would inform the applicants that there were no schools in the vicinity, when in fact King Arthur's Court is adjacent to the athletic field of a high school and within a mile of an elementary school. Tr. 1-58-60; Tr. 2-12-14, 175-76.

[10]A final illustration of Respondent's lack of credibility is provided by his response to my hypothetical question. I asked him whether he would rent to an otherwise qualified single parent with a 12 year old child. He replied that he would not refuse. Tr. 1-49. This testimony is contradicted not only by what he said to Mr. Ziegeldorf, but by his own affidavit in which he admits to screening applicants for children. Int. Ex. 6. In paragraph 7 of that affidavit he states the reasons for the screening: 1) the tenants range between 50 and 75 years of age, 2) they are unmarried without children and pets, and 3) they are either divorced or widowed. *Id.* It is evident from the reasons given for screening that Mr. Jancik never intended to permit families with children to occupy the premises despite his assertion to the contrary at the hearing.

[11]Mr. Jancik explained that Black Bohemians are the offspring or descendants of Black American soldiers who served under General Patton in Czechoslovakia during the World War II. Tr. 1-64-65.

Cherokee Indian. Int. Ex. 6, at para. 10; Tr. 1-82; Tr. 2-10. He even asked Mr. Ziegeldorf, the HUD investigator, to identify his nationality. Tr. 2-16.[12]

17. Respondent's response to a question concerning the reason for a 1965 visit to Chicago by Dr. Martin Luther King Jr. was that he came to make "the women happy." Tr. 1-98.

18. Two of the units in Building 44 are currently rented to Blacks. Both rentals, however, occurred after the Council filed its complaint of discrimination. C.P. 8 at 4-5; Jt. Ex. 1.[13]

Damages

19. The average cost to the Council of a housing discrimination test in 1990 was $750. Tr. 2-119-122. This amount does not include any time that Mr. Brewer would have spent testifying on the particular action. In this case, he spent approximately three hours testifying. His hourly rate is $15.38.[14]

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[12]Mr. Jancik described himself as a European of the "old school," someone who perceives people in terms of their national origin. Tr. 2-16. He explained that he makes these inquiries in order to be social. Tr. 1-64.

[13]Mr. Jancik claims to have rented to a Black tenant before the Council filed its complaint of discrimination. He does not recall the tenant's name and asserts that he has no records which would substantiate this claim. In any event, evidence of this tenancy, does not prove that Respondent did not discriminate against Blacks because he did not learn the race of the tenant until after he moved out. Tr. 1-88, 92-93. Moreover, even if Respondent had rented to a Black tenant, this does not necessarily establish that he did not discriminate against Blacks. *See Davis v. Mansards,* 597 F. Supp. 334, 345 (N.D. Ind. 1984).

[14]This figure is derived by dividing Mr. Brewer's annual $32,000 salary by 2080 (the number of hours in 52 40 hour work weeks).

According to Intervenors, Mr. Brewer was at the hearing for approximately one and a half hours and spent an additional 90 minutes waiting to testify. There is no basis in the record for disputing this claim. Accordingly, I conclude that Mr. Brewer spent a total of three hours testifying and waiting to testify.

20. The current cost to the Council of a test is $920. Tr. 2-120.

21. Because of the litigation of this case, the Council failed to obtain a testing contract with a lender as part of its Fair Lending Program. The lender declined to work with the Council because the Council could not perform its services as quickly as the lender desired. The Council normally receives between $9,000 and $12,000 for this type of contract. Tr. 2-129-133.

22. Marsha Allen experienced anger, humiliation and hurt feelings as a result of Respondent's inquiry concerning her race.[15] Tr. 1-144-145. Because she experienced discrimination in the past based on her race, she believed that her race "might have been a determination in [her] not being able to see the apartment." Tr. 1-171.

Discussion

Standing

The Council and Marsha Allen are "aggrieved persons" within the meaning of the Act which defines that term to include "any person who . . . claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602 (i). The term "persons" includes corporations as well as individuals. 42 U.S.C. § 3602 (d). Both the Council and Ms. Allen claim injury from Respondent's actions. The Council has standing because, at a minimum, it expended resources investigating and prosecuting this action. *See City of Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086, 1095 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2961 (1993). Ms. Allen suffered anger, humiliation,

[15] I find Ms. Allen to be a forthright and credible witness based upon my observation of her demeanor and the consistency of her testimony with the record evidence.

and hurt feelings. She has standing even though she did not actually intend to rent from Mr. Jancik. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 374-78 (1982).

Charging Party's Motion to Amend the Charge

In its Post-hearing Brief, the Charging Party moves to amend the Charge to include allegations of national origin discrimination. Charging Party's Post-hearing Brief at 31 n.15. It contends that allegations of national origin discrimination are "reasonably within the scope of the original charge and have been tried by the express or implied consent of the parties." 24 C.F.R. § 104.440 (a)(3). At the close of the record I ordered Post-hearing Briefs to be filed simultaneously and did not allow for the filing of reply briefs. Tr. 2-179. Had the Charging Party made this Motion prior to the submission of its Post-hearing Brief, the Respondent would have been afforded an opportunity to oppose the Motion. Because timely formal notification in the form of a Motion was not provided to Respondent, the Charging Party's Motion to Amend the Charge is denied.

Discriminatory Advertising

The Act provides that it shall be unlawful -

> To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any *preference*, limitation, or discrimination, based on race, color, religion, sex, handicap, *familial status*, or national origin, or *an intention to make any such preference*, limitation, or discrimination.

42 U.S.C.§ 3604 (c) (emphasis added).

This section is violated if 1) if an advertisement, as interpreted by the ordinary reader, expresses a preference based on familial status, or 2) if it is intended to express such a preference. *Ragin v. New York Times*, 923 F.2d 995, 999-1002

(2nd Cir.), *cert. denied,* 112 U.S. 81 (1991); *see also Soules v. HUD*, 967 F.2d 817, 824 (2nd Cir. 1992); *HOME v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 647-48 (6th Cir. 1991). Respondent has violated the statute in both ways.

In *Ragin*, a case involving racially discriminatory advertising, the court construed the words "indicate" and "preference" as follows:

> Giving ["indicates"] its common meaning, we read the statute to be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question.
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> * * *
>
> Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word "preference" to describe any ad that would discourage an ordinary reader of a particular race from answering it.

923 F.2d at 999-1000.

Respondent's advertisement of "mature person preferred" expresses a preference based on familial status, i.e., a desire to exclude families with children. To an ordinary reader, the phrase "mature person" connotes adult. This phrase is included in HUD's regulations as among the words, phrases, and forms which "typify those most often used in residential real estate advertising to convey either overt or tacit discriminatory preferences or limitations." 24 C.F.R. § 109.20 (b)(7). The word "preferred" is a verb form of the noun "preference," the very word Congress used to define one type of discriminatory advertising. The phrase "mature person preferred" suggests to the ordinary reader that adults are preferred and children "dispreferred," and it would discourage a prospective applicant with children from responding to the ad. Accordingly, I conclude that the phrase indicates a preference based on familial status and is violative of 42 U.S.C. § 3604(c).

The record establishes by direct evidence that Respondent

intended his readers to understand that families with children were "dispreferred." He screened applicants to determine whether they had minor children. Only those applicants without children would be referred to his on-site manager. Consistent with his policy, Respondent questioned both Ms. Gunderson and Ms. Allen about the composition of their families. Only after each replied that they had no children, did he give them the on-site manager's telephone number. He told Ms. Gunderson that he did not want teenagers and Ms. Allen that he did not want children. Finally, he admitted in his conversations with Mr. Ziegeldorf that he did not want to rent to a single parent with a child. Accordingly, the record establishes that Respondent intended the advertisement to express a preference against families with children and that he violated 42 U.S.C. § 3604 (c).

Discriminatory Statements

The same subsection that prohibits discriminatory advertising encompasses other discriminatory statements, whether written or oral. Thus, Respondent's statements to the testers that he did not want children and teenagers also violate the Act because, on their face, they indicate a preference based on family status. *See* 42 U.S.C. § 3604 (c).

Mr. Jancik's inquiries concerning Ms. Gunderson's and Ms. Allen's race constitute additional violations of this subsection. Race is not reasonably related to housing qualifications. *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975). Accordingly, Respondent's inquiries served no legitimate purpose. Thus, a reasonable person when asked to state whether he or she is a "White or Black Norwegian," or when bluntly requested to identify his or her race, would naturally assume that race was being used as a factor in determining eligibility. "[T]here is no reason to ask, if there is no reason to know." *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,008 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). Accordingly, Respondent's statements to both Ms. Gunderson and Ms. Allen indicated a preference, limitation, or discrimination, based on race in violation of 42 U.S.C. § 3604

(c).

I further conclude that Respondent's inquiries to the testers concerning family status violated 42 U.S.C. § 3604 (c). Whereas inquiries as to race are not relevant to determine the qualifications of housing seekers, questions concerning family status may be lawful under certain circumstances. Thus, a question relating to children which is intended to ascertain the qualifications of a housing applicant may be lawful. *HUD v. Downs*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,011, 25,171 at 25,180 (HUDALJ Sept. 20, 1991), *aff'd sub nom. Soules v. HUD,* 967 F.2d 817 (2d Cir. 1992). However, Respondent's questions were not intended for this purpose. Rather, he intended to discriminate against families with children, *see supra* pp. 6 and 9, and his inquiries were intended to learn whether applicants had children to eliminate them as tenants.

Remedies

Having found that Respondent has engaged in discriminatory housing practices, Complainants are entitled to "such relief as may be appropriate, which may include actual damages . . . and injunctive or other equitable relief." 42 U.S.C. § 3612 (g)(3). Respondent may also be assessed a civil penalty "to vindicate the public interest." *Id.* The Charging Party seeks $25,818.50 in tangible and intangible damages on behalf of the Council and $5,000 on behalf of Marsha Allen as compensation for her emotional distress. The Council seeks $49,814.65 in tangible and intangible damages. Marsha Allen seeks $10,000 as compensation for emotional distress. Both the Charging Party and Intervenors seek the maximum civil penalty of $10,000 and certain equitable relief.

Economic Loss

Past Diversion of Resources

A fair housing organization may be compensated for the diversion of its resources which result from its intervention in a housing discrimination case. *Village of Bellwood v. Dwivedi,*

895 F.2d 1521 (7th Cir. 1990); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987); *HUD v. Properties Unlimited*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,009, 25,148 (HUDALJ Aug. 5, 1991). As this tribunal has stated:

> The time and money that a fair housing organization . . . spends pursuing a legal remedy for housing discrimination diverts time and money away from the organization's other functions and goals. In other words, discrimination costs the organization the opportunity to use its resources elsewhere. These "opportunity costs" for the diversion of resources should be recouped from the parties responsible for the discrimination. *See Dwivedi*, 895 F.2d at 1526. ("These are opportunity costs of discrimination, since although the counseling is not impaired directly, there would be more of it were it not for the . . . discrimination."); *Saunders v. General Servs. Corp.*, 659 F. Supp. [at] 1060 . . . ($2,300 for "diversion of resources"); *Davis v. Mansards*, 597 F. Supp. 334, 348 (N.D. Ind. 1984) ($4,280 for out-of-pocket expenses).

Id.

In order to prosecute this action the Council used its staff members to perform tasks related to this litigation and investigation when they could have been working on its other programs. The cost to the Council included $750 to prepare and conduct the test, and $46.14 for the three hours spent by Mr. Brewer at the hearing. Accordingly, the Council suffered an economic loss in the amount of $796.14.[16]

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[16]The Council claims Mr. Voci's attorney fees as an element of the Council's claim of damages for economic loss. During the hearing, I requested that, prior to submitting the Intervenors' Post-hearing Brief, Mr. Voci file an affidavit together with supporting documents substantiating the amount of time he spent on this case and his hourly rate. Tr. 2-156. Respondent was afforded an opportunity to respond to this submission in his Post-hearing Brief and did so. The Council's submission is essentially an

Future Diversion of Resources

The Charging Party and the Council seek compensation for the cost to the Council of conducting tests of Respondent's housing practices for his two buildings over the next five years. The Council seeks to perform twenty tests at a cost of $920 per test for a total cost of $18,400. In addition, the Council seeks to train Respondent's managers at a cost of $550.[17] Awards to fair housing organizations of expected monitoring and training costs have been awarded in other cases, and I find such an award warranted here as well. *See Matchmaker,* 982 F.2d at 1099 (upholding magistrate's award of $5,000 for expected costs to fair housing organization to monitor respondent's records, $6,000 for auditing of its sales practices, and $2,500 for the cost of training seminars); *Properties Unlimited,* 2 Fair Housing-Fair Lending at ¶ 25,148-49 ($3,592 awarded to cover the anticipated three-year costs of training sessions, unannounced paired tests, and the monitoring of tenant records).

I conclude that the Council's claim for reimbursement for future diversion of its resources for three years, rather than five, is reasonable and appropriate under the circumstances of this case. Three years should be a sufficiently lengthy period to insure Respondent's future compliance. Accordingly, the Council will be awarded $11,590 (($920 x 12) + $550) to

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attorney fee petition. I have reconsidered the correctness of this procedure. HUD regulations specifically provide that "*following the issuance of the final decision* . . . any prevailing party, except HUD, may apply for attorney fees and costs . . . ." 24 C.F.R. § 104.940 (emphasis added). Because the regulation specifically states that attorney fee petitions must be dealt with after the issuance of a final decision, the Council's claim for attorney fees cannot be an element of its damage award. However, the parties may resubmit a petition for attorney fees and response thereto, if the Council is a prevailing party at such time as this decision becomes final.

[17]The Council requests that I order Respondent to hire "independent" managers for each building. Intervenors' Post-hearing Brief at 28. There being no showing that Respondent's present managers will not comply with this tribunal's order, I do not agree that such a requirement is necessary.

compensate it for the future diversion of its resources.

Lost Financial Opportunity

The Council seeks damages in the amount of $12,000 for the loss of a contract with a lender to perform testing and training of the lender's employees. Ms. Pennick testified that "one of those banks declined to work with us because we could not start as quickly as that bank wanted us to." Tr. 2-129. She attributes the Council's inability to start quickly to its allocation of staff resources to pursue this litigation. Although the negotiations did not progress to the point of an agreement on a contract price, Ms. Pennick testified that this type of contract ranges between $9,000 and $12,000.[18] Tr. 2-129-130. Respondent offers no evidence to refute either the likelihood of the contract having been awarded or the contract price. Accordingly, the unrefuted testimony of Ms. Pennick establishes by a preponderance of evidence the likelihood of a contract having been awarded. However, there is no basis for concluding that the lost contract would have exceeded the minimum amount. Accordingly, Intervenors are awarded $9,000.

Frustration of Purpose

The Council seeks $5,500 to compensate it for "impairment of objectives" and the Charging Party seeks $2,000 for "frustration of the Council's goals." The parties are seeking redress because this case required that the Council assume a litigious, adversarial position. This adversarial stance presumably undermines the Council's more cooperative programs whereby the Council collaborates and works with housing providers, lenders, and others. The Council also contends that litigation has a negative impact on funding because potential "funding sources frown upon adversarial litigation." Intervenors' Post-hearing Brief at 30. The Council bases its claims on the testimony of Ms. Pennick that litigation causes a

[18]The Charging Party seeks $10,500 to compensate the Council. Presumably the Charging Party arrived at this figure because it is a median contract price between the minimum of $9,000 and the maximum of $12,000.

"backlash" among landlords participating in the Council's cooperative programs. These landlords, for example, presumably can longer trust Council employees because they might testify against these same landlords in some future litigation. Tr. 2-110-112.

An award for "frustration of purpose" must be based upon an actual injury. *See Havens Realty,* 455 U.S. at 379 (In order to have standing to assert claims in its own right, a fair housing organization must be able to demonstrate a "concrete and demonstrable injury" with a "consequent drain on its resources" and not "simply a setback to the organizations abstract social interests."). There is no evidence, however, that an actual "backlash" of this kind resulted or will result from the Council's conduct, or that the Council must divert resources to deal with this purported "backlash." Accordingly, there has been no demonstration of a concrete injury to the Council for "frustration of purpose" other than diversion of its resources for which it will be compensated. *See supra* pp. 11-12.[19]

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[19] An award for "frustration of purpose" may not duplicate an award for diversion of resources. *See Matchmaker,* 982 F.2d at 1099. Because I previously determined that the Council is entitled to an award for the diversion of its resources, the Council must demonstrate that some additional "actual" damages resulted from the "frustration of its purpose." The Charging Party and Intervenors cite *Saunders,* 659 F. Supp. 1042, and *Mansards,* 597 F. Supp. 334, as support for their "frustration of purpose" claims. Certainly *Saunders* and arguably *Mansards* involved awards for actual diversion of resources. In *Saunders* a $10,000 award was based on a finding that large-scale discriminatory advertising had caused a substantial impact on the organization's mission to ensure equal housing opportunities, thereby forcing it to divert significant resources from fulfilling other functions to identify and counteract the effects of such advertising. 659 F. Supp. at 1060-61. The basis for the award in *Mansards* is somewhat ambiguous. In that case a $1,000 award was based on findings that the lawsuit frustrated one goal (enhancing cooperation between the organization and landlords) while advancing the goal of promoting equal opportunity. In a terse statement the court awards $1,000 "in light of this dual effect." 597 F. Supp. at 348. Because the *Mansards* court relied on *Havens Realty,* 455 U.S. 363, in finding that the organization had standing, it presumably did not ignore the Supreme Court's admonition that more than an abstract injury is required for an award for "frustration of purpose." Accordingly, I read *Mansards* as holding that the $1,000 was awarded to compensate the organization for an actual diversion of resources necessary to combat the effects of the defendant's conduct. *See*

Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications,* 26 The John Marshall Law Review 3, 16 n.75 (1992).

Emotional Distress

The Charging Party and Intervenor Marsha Allen claim damages for the embarrassment, humiliation, and emotional distress suffered by Ms. Allen resulting from Respondent's racial inquiry. The Charging Party seeks $5,000 on behalf of Ms. Allen; Ms. Allen seeks $10,000.

An evaluation of the sufficiency of evidence of emotional distress to support an award of damage involves both direct evidence of emotional distress and the circumstances of the act causing that distress. *U.S. v. Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1992) (citing *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981)). "The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress." *Id.* Racial discrimination against Blacks, because it is one of the "relics of slavery" is the type of action that would reasonably be likely to humiliate or cause emotional distress. *Seaton v. Sky Realty Co., Inc.,* 491 F.2d 634, 636 (7th Cir. 1974).

Testers, by virtue of their role as discrimination investigators, are not disqualified from receiving compensation for emotional distress resulting from racial discrimination. *See Balistrieri,* 981 F.2d at 933 (upholding what the court characterized as a "modest" jury award of $2,000 for each of five testers); and *Mansards,* 597 F. Supp. at 347-48 (awards, respectively, of $2,500 and $5,000 to husband and wife testers). In *Balistrieri* the United States Court of Appeals for the Seventh Circuit considered the arguments against such awards. Testers are investigators who invite the harm inflicted upon them. One could argue that one who invites this harm by testing for compensation is less likely to feel actual humiliation than a bona fide home seeker. In fact, a tester who ferrets out discrimination might conceivably receive the positive benefits of having done his or her job well and correcting illegal conduct. *Balistrieri,* 981 F.2d at 932. Having considered these

arguments, the court evaluated the "somewhat general and conclusory" testimony of the testers and concluded that this evidence was sufficient to support the jury's "modest" award based upon its finding that the "testers did suffer the indignity of being discriminated against because of their skin color." *Id.* at 933. In *Mansards*, the United States District Court for the Northern District of Indiana, based its award of $5,000 to the wife tester on evidence that "she was deeply affected," and that the discrimination "hampered her relationship with her husband Cecil, and with the rest of her family." 597 F. Supp. at 347. In awarding $2,500 to her husband, the court found that he vicariously suffered from the effects of the discrimination on his wife. *Id.* at 348.

Ms. Allen's emotional distress claim is based solely on her testimony that 1) she was upset and angered because there was no apparent reason for Respondent to ask this question, and 2) that, because she had been discriminated against in the past, she would not have been able to see the apartment because she was Black. She did not express this anger to anyone or include it in her report,[20] indicate a negative impact on members of her family or others, or seek medical treatment or therapy. Tr. 1-167. Ms. Allen's testimony, like that of the *Balistrieri* testers, is somewhat general and conclusory. She did not suffer physically or seek medical treatment. Accordingly, I conclude that a modest award of damages in the amount of $2,000 is warranted for emotional distress.[21]

Civil Penalty

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[20]I credit Ms. Allen's statement that reports were to be factual and were not to record emotional reactions. Tr. 1-167.

[21]The Charging Party and Ms. Allen argue that the immediacy of Mr. Jancik's words resulted in greater damage to her. However, Ms. Allen did not testify that her anger was greater because Respondent directly inquired of her race, than it would have been if she had later learned that she was not shown an apartment because of her race. Without this evidence, I cannot infer increased damage from these circumstances. It is possible that greater harm to her psyche would have resulted had she subsequently learned that she had been mislead.

To vindicate the public interest, the Act also authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 812 (g)(3)(A); 24 C.F.R. § 104.910(b)(3). Determining an appropriate penalty requires
consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether a respondent has previously been adjudged to have committed unlawful housing discrimination; (4) a respondent's financial resources; and (5) the degree a respondent's culpability. *See HUD v. Jerrard,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,092 (HUDALJ Sept. 28, 1990); *Blackwell* 2 Fair Housing-Fair Lending at ¶ 25,014-15; House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988,* H.R. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). Both the Charging Party and Intervenors seek imposition against Respondent of the maximum civil penalty of $10,000.

Nature and Circumstances of the Violation

The nature and circumstances of this violation merit the maximum civil penalty.
Respondent's advertisements, inquiries and statements relating to race and familial status were frequent, consistent, and blatant. Because of his demonstrated lack of credibility, I do not accept his explanation that these remarks were "social." *See supra* notes 7, 9, and 10. Rather, his stereotyped characterizations compel the conclusion that he made these inquiries in order to eliminate what he views as undesirable tenants based upon his own biases. This conclusion is supported by other record evidence. Specifically, he 1) screened applicants, 2) never rented to families with children and only referred applicants without children to his rental manager, 3) falsely told prospective tenants with children that no schools were located nearby, and 4) in the 25 years in which he has owned rental real estate he knowingly rented to Blacks only after the instant complaint was brought. Accordingly, I conclude that these violations were serious, intentional and were not the result of ignorance or happenstance. .

Deterrence

Respondent still owns two multi-family units. Accordingly, there is a need to insure that he is deterred from committing further acts of housing discrimination. In addition the imposition of a civil penalty will serve the goal of deterring others inclined to commit similar violations. Substantial penalties send the message to violators that housing discrimination is not only unlawful, it is expensive. *Jerrard,* 2 Fair Housing-Fair Lending at ¶ 25,092. Because of the blatant, unmitigated nature of these violations, a maximum civil penalty is appropriate to deter Respondent and other housing providers from committing similar acts.

Lack of Previous Violations

There is no evidence that Respondent in the instant case has previously been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against Respondent is $10,000, pursuant to 42 U.S.C. § 812 (g)(3)(A) and 24 C.F.R. § 104.910 (b)(3)(i)(A).

Respondent's Financial Circumstances

Evidence regarding Respondent's financial circumstances is peculiarly within his knowledge, so he has the burden of introducing such evidence into the record. If he fails to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of his financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *Jerrard,* 2 Fair Housing-Fair Lending at ¶ 25,092; *Blackwell,* 2 Fair Housing-Fair Lending at ¶ 25,015.

Respondent has stipulated that he has a net worth of $400,000 and an annual income of $30,000. There is no evidence that the imposition of the maximum civil penalty would cause him an undue hardship.

Culpability

Respondent drafted or caused the discriminatory

advertisement to be drafted. He made the racial and familial status inquiries and statements during his telephone conversations with Ms. Gunderson and Ms. Allen. Accordingly, there is no issue of vicarious responsibility. After consideration of the five factors, I determine that imposition of a $10,000 penalty is warranted.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing.[22] 42 U.S.C. § 3612 (g)(3). The purposes of injunctive relief include the following: eliminating the effects of past discrimination, preventing future discrimination, and positioning the aggrieved persons as close as possible to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to `use any
available remedy to make good the wrong done.'" *Moore v. Townsend*, 525 F.2d at 485 (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence shows that Respondent discriminated against Intervenors the Leadership Council for Metropolitan Open Communities and Marcia Allen on the basis of familial status and race, in violation of section 804 (c) of the Act and 24 C.F.R. §§ 100.50 (b)(4) and 100.75 (a). The

[22]"Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *HUD v. Blackwell,* 908 F.2d 864, 874 (11th Cir. 1990) (quoting *Marable v. Walker,* 704 F.2d 1219, 1221 (11th Cir. 1983)).

Leadership Council for Metropolitan Open Communities and Marsha Allen suffered actual damages for which they will receive compensatory awards. Further, to vindicate the public interest, injunctive relief will be ordered, as well as a civil penalty against Respondent Stanley Jancik.

ORDER

It is hereby ORDERED that:

1. Respondent Stanley Jancik is permanently enjoined from discriminating with respect to housing. Prohibited actions include, but are not limited to:

a. refusing or failing to rent a dwelling, or refusing to negotiate for the rental of a dwelling, to any person because of race, color, familial status, or national origin;

b. otherwise making unavailable or denying a dwelling to any person because of race, color, familial status, or national origin;

c. discriminating against any person in the terms, conditions, or privileges of the rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, familial status, or national origin;

d. making, printing, or publishing, or causing to be made, printed, or published, any notice, statement, or advertisement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, familial status, or national origin;

e. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair

Housing Act;

f. retaliating against Intervenors the Leadership Council for Metropolitan Open Communities and Marsha Allen or anyone else for their participation in this case or for any matter related thereto.

2. Respondent Stanley Jancik and his agents and employees shall cease to employ any policies or practices that discriminate against families with children.

3. Respondent Stanley Jancik and his agents and employees shall refrain from using any lease provisions, rules, and regulations, and other documentation or advertisements, that indicate a discriminatory preference or limitation based on race, color, familial status, or national origin.

4. Consistent with 24 C.F.R. Part 109, Respondent Stanley Jancik shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondent Stanley Jancik shall display the HUD fair housing poster alongside any "for rent" signs posted in connection with any dwellings that he owns, manages, or otherwise operates, as of the date of this Order and subsequent to the entry of this Order.

5. Respondent Stanley Jancik shall institute internal record-keeping procedures, with respect to any operation he owns and any other real property acquired by Respondent Stanley Jancik that are adequate to comply with the requirements set forth in this Order. These will include keeping all records described in paragraph 6 of this Order. Respondent Stanley Jancik will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Respondent Stanley Jancik will also permit representatives of the Council to inspect and copy all pertinent records twice each year upon reasonable notice. Representatives of HUD and the Council shall endeavor to minimize any inconvenience to Respondent Stanley Jancik occasioned by the inspection of such records.

6. On the last day of every third period beginning, 30 days after this decision becomes final (or four times per year), and continuing for three years from the date this Order becomes final, Respondent Stanley Jancik shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, Ralph H. Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, Illinois 60604, provided that the director of that office may modify this paragraph of this Order as he or she deems necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, managed, or otherwise controlled in whole or in part by Respondent Stanley Jancik indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and, if rejected, the reason for such rejection. Respondent Stanley Jancik shall maintain the originals of all applications described in the log.

b. A list of vacancies at properties owned, operated, managed, or otherwise controlled in whole or in part by Respondent Stanley Jancik during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.

d. A list of all people who inquired, in writing, in person, or by telephone, about renting an apartment, including their names and addresses, the date of their

inquiry, and the disposition of their inquiry.

e. A description of any changes in rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants (regardless of whether the change was formal or informal, written or unwritten) made during the reporting period, and a statement of when the change was made, how and when tenants and applicants were notified of the change, whether the change or notice thereof was made in writing and, if so, a copy of the change and/or notice.

7. Respondent Stanley Jancik shall post at any offices used by him or his agents which are open to the public a list of all available units, specifying for each unit, its address, the number of bedrooms in the unit, the rent for the unit, and the date of availability.

8. To ensure that this Order is followed, the Leadership Council for Metropolitan Open Communities has agreed to provide fair housing training to staff employed by Respondent Stanley Jancik in the housing rental business. The Council has also agreed to perform four paired tests each year for three years. In addition, the Council may monitor Respondent's tenanting records twice each year. During the pendency of this Order, should the Council come to believe that it has or will become unable to carry out any or all of these tasks, in whole or in part, it shall so inform this tribunal, stating the reasons for its inability to so perform, and the Order may be modified as appropriate.

9. Within forty-five (45) days of the date on which this Order becomes final, Respondent shall pay actual damages to the Leadership Council for Metropolitan Open Communities of $796.14 for out-of-pocket expenses, $9000 to compensate the Council for it lost financial opportunity, and $11,590 to compensate the Council for future monitoring, testing of the rental housing business owned by Respondent Stanley Jancik and the training of

his agents and employees.

10. Within forty-five (45) days of the date on which this Order becomes final, Respondent shall pay actual damages in the amount of $2,000 to Complainant Marsha Allen to compensate her for emotional distress.

11. Within forty-five (45) days of the date on which this Order becomes final, Respondent Stanley Jancik shall pay a civil penalty of $10,000 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612 (g)(3) and 24 C.F.R. § 104.910, and will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

_____
WILLIAM C. CREGAR
Administrative Law Judge

Dated: October 1, 1993.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by WILLIAM C. CREGAR, Administrative Law Judge, in HUDALJ 05-91-0969-1, were sent to the following parties on this 1st day of October, 1993, in the manner indicated:

_____
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